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Active Guidance of Fundamental Rights Protection by the Court of Justice of the European Union: Exploring the Possibilities of a Positive Obligations Doctrine

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Abstract

The protection of fundamental rights may, in addition to the primary obligation for states to refrain from interfering with an individual's rights, require positive action to be undertaken by public authorities. The development of positive obligations is well known from the case law of the European Court of Human Rights (ECtHR). Could such a development also take place within the case law of the Court of Justice of the European Union (CJEU), considering that it must protect the same range of fundamental rights? If so, in which areas of European Union (EU) law does this occur? And how does this relate to the limits that have been placed on the protection of fundamental rights by the EU, especially on the basis of the principle of attributed powers? This article aims to discuss various procedural as well as some material positive obligations, which have been developed in the case law of the CJEU, that also amount to certain positive obligations. It will be examined how these obligations relate to the various limits laid down in EU law, particularly those which aim to prevent the expansion of EU powers. While there is a certain basis laid down in EU law for imposing procedural as well as material positive obligations, this article suggests that the CJEU may further draw inspiration from the case law of the ECtHR in dealing with this concept.

I Introduction

From the perspective of European Union (hereinafter: EU) law there exists a certain fear concerning the obligations that may arise from the protection of fundamental rights. Within the EU Charter (hereinafter: CFR) and within the context of the accession of the EU to the European Convention on Human Rights (hereinafter: the ECHR), it has been heavily emphasised that the protection of fundamental rights may not go beyond or expand the powers

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of the EU.¹ The fear of the expansion of EU powers in this area stems to a certain extent from the case law of the European Court of Human Rights (hereinafter: the ECtHR) which has interpreted fundamental rights in such a way as to not only require states to abstain from interfering in those rights, but they may also require states to fulfil certain positive obligations to ensure the effective protection of those rights.² On the basis of this approach, the ECtHR has concluded in *M.S.S.*, and more recently in *Tarakhel*, that states parties may be required to undertake some action to ensure that asylum seekers do not face treatment which is contrary to the prohibition of torture and inhuman or degrading treatment upon their return to another Member State of the EU.³ As is widely known, these rulings of the ECtHR have direct effects for the obligations of the Member States of the EU under the Dublin Regulation, which in principle requires asylum seekers to be sent back to the Member State where they first arrived in the EU.⁴ This Regulation is based on the principle of mutual recognition. In relation to areas which are governed by the principle of mutual recognition, the Court of Justice of the European Union (hereinafter: the CJEU) has held that 'save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.'⁵ From this assertion it could be implied that there is very little room for the Member States to fulfil any active requirements to ensure the effective protection of fundamental rights. It is questionable whether such an approach is tenable in view of the case law of the ECtHR. Moreover, it actually stands in contrast with the CJEU's rather more active approach towards fundamental rights in some other fields of EU law – a contrast this article specifically aims to show.

¹ See in particular Art. 51(2) CFR and Art. 6(2) Treaty on European Union (hereinafter: TEU).

² See in general A.R. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart 2004); and D. Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (London: Routledge 2012).

³ ECtHR 21 January 2011, appl. no. 30696/06, *M.S.S. v. Belgium and Greece*; and ECtHR 4 November 2014, appl. no. 29217/12, *Tarakhel v. Switzerland*. See for an elaborate analysis of the positive obligations which the EU could incur in this context after accession to the ECHR: C. Stubberfield, 'Lifting the Organisational Veil: Positive Obligations of the European Union Following Accession to the European Convention on Human Rights', *Australian International Law Journal* 19 (2012), p. 117-142; and section 5 of this article.

⁴ (as currently in force:) Regulation No 604/2013/EU establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, *OJ* [2013] L 180/31.

⁵ CJEU 18 December 2014, *Opinion 2/14*, par. 191-194. In previous judgments on this matter, the CJEU also did not clarify if the Member States would incur any specific active requirements on the basis of fundamental rights, see CJEU 21 December 2011, Joined Cases C-411/10 and C-493/10, *N.S. and Others*; CJEU 10 December 2014, Case C-394/12, *Abdullahi*; CJEU 14 November 2013, Case C-4/11, *Puid*; and CJEU 6 November 2013, Case C-245/11, *K*.

This article will discuss how the CJEU itself has relied on fundamental rights to create new obligations for the Member States and has gone beyond what is specifically provided for by (secondary) EU law. The CJEU has especially been willing to actively guide the remedies and powers that need to be provided by national courts to ensure the effective application of EU law. Increasingly, the case law of the CJEU also provides procedural obligations which must be fulfilled by administrative authorities, and even some material obligations. In the case of *Abdida*, the CJEU decided that Member States must adopt interim measures, as well as provide for the basic needs of a seriously ill third-country national awaiting the appeal to a decision to return on the basis of the *non-refoulement* principle.⁶ The case law of the CJEU has also revealed, albeit in very few situations, that even some legislative changes may be needed in order to protect fundamental rights.

The objective of this article is to provide some suggestions on how the CJEU could legitimately ensure the effective protection of fundamental rights within its case law. Attention is paid to several important limits, which have been laid down within EU law itself, as well as to criticisms that have been expressed towards the development of positive obligations in the case law of the ECtHR.

This article will approach the foregoing matters in the following order: First, some further insight will be provided into what positive obligations, as defined by the ECtHR, actually entail (section 2). Thereafter, the particular development of positive obligations in the case law of the CJEU will be discussed (section 3). By looking at several limitations which have been laid down in EU law, the analysis then aims to determine when the development of such obligations actually raises tensions under EU law (section 4). Subsequently it will be discussed how the case law of the ECtHR could provide helpful principles, which may be used by the CJEU, in order to deal with the development of its own positive obligations (section 5). The main conclusions of this article will be set forth in the last section (section 6).

2 The Development of Positive Obligations by the ECtHR

Positive obligations have been developed by the ECtHR in relation to nearly all of the (predominantly) civil and political rights of the Convention.⁷ Some of its most renowned obligations include the obligation for states parties to undertake independent and effective investigations into infringe-

⁶ CJEU 18 December 2014, Case C-562/13, *Abdida*, par. 59-62.

⁷ For a provision-based overview of the development of positive obligations within the ECHR, see Mowbray (2004); and for a more critical analysis of the theory of positive obligations as developed by the ECtHR see Xenos (2012), *supra* n. 2.

ments of the right to life (Art. 2 ECHR);⁸ the obligation to grant legal aid to ensure an effective right of access to court (Art. 6 ECHR);⁹ and the obligation to provide for legal recognition of one's family ties or one's sexual identity on the basis of the right to respect for private and family life (Art. 8 ECHR).¹⁰ These obligations have been read into the Convention by the ECtHR on a case-by-case basis as obligations which arise 'in addition to the primary negative undertaking which follows from the [ECHR]'.¹¹ The ECtHR does not provide an elaborate definition of the concept of positive obligations. The great variety of positive obligations, which are now contained in its case law, demonstrate that it concerns obligations which may arise for states parties to protect individuals from infringements that can be caused by their own state agents, by private parties or in relation to the vulnerabilities or the social inequality of particular (groups of) individuals such as detainees, disabled persons, and asylum seekers.¹²

Positive obligations cannot be derived from the text of the Convention, but are implied by the ECtHR on the basis of the general obligation which states have agreed to under Article 1 ECHR to secure the Convention's rights and freedoms to individuals falling within their jurisdiction. In addition, the ECtHR refers to the principle of effective protection of fundamental rights as a basis for the development of positive obligations, which requires fundamental rights protection not to become illusory but remain practical and effective. Also, Article 13 ECHR constitutes an important basis for the development of procedural obligations as it requires states to provide for effective remedies in relation to violations of the rights of the Convention.¹³ The incorporation of positive obligations into the ECHR has extended the fundamental rights obligations beyond the sphere of rights that states parties had knowingly and willingly contracted themselves to respect under the ECHR and have, to a certain extent, imposed burdensome obligations for states parties in organisational and financial terms.¹⁴ Generally the recognition of these obligations implies a more active role for the states parties in respect of the protection of fundamental rights requiring the domestic legislature to introduce or amend its laws, the executive to devise

⁸ See ECtHR 27 September 1995, appl. no. 18984/91, *McCann and Others v. the United Kingdom*, par. 161; ECtHR 30 November 2004, appl. no. 48939/99, *Öneryildiz v. Turkey*, par. 65; and ECtHR 9 April 2009, appl. no. 71463/01, *Case of Šilih v. Slovenia*, par. 154 and 159.

⁹ See ECtHR 9 October 1979, appl. no. 6289/73, *Airey v. Ireland*, par. 32-33.

¹⁰ See e.g. ECtHR 13 June 1979, appl. no. 6833/74, *Marckx v. Belgium*, par. 31; and ECtHR 11 July 2002, appl. no. 28957/95, *Case of Christina Goodwin v. the United Kingdom*.

¹¹ See e.g. ECtHR, judgment of 28 May 1985, appl. nos. 9214/80 to 9474/81, *Case of Abdulaziz, Balkandali and Cabales v. the United Kingdom*, par. 67.

¹² See further Xenos (2012), *supra* n. 2, p. 141-172.

¹³ See e.g. ECtHR 13 June 1979, appl. no. 6833/74, *Marckx v. Belgium*, par. 31.

¹⁴ See P. van Dijk, "Positive Obligations" Implied in the European Convention on Human Rights: Are States Still the 'Masters' of the Convention?, in: P. Baehr, M. Castermans-Holleman & G. van Hoof (eds), *The Role of the Nation-State in the 21st Century* (The Hague: Kluwer Law International 1998), p. 17.

special procedures and for national courts to interpret national law in accordance with the requirements of the protection of fundamental rights.¹⁵

Perhaps in response to the criticism, which has been expressed by scholars as well as by judges of the ECtHR itself,¹⁶ the ECtHR increasingly provides more clear indications as to the positive obligations which states parties may incur under the ECHR by clarifying the methodological choices which it makes to develop these obligations and by introducing several limitations as to the scope of the positive obligations which may arise under the Convention.¹⁷ By refining its positive obligations, the ECtHR is to some extent limiting the powers of states at national level even further. However, it also increases the legal certainty and foreseeability for states in respect of the obligations which they may expect to incur, and for individuals in respect of the claims which they may expect to find covered by the Convention. The case law of the ECtHR continues to develop with substantially newer positive obligations in such fields as the environment and in relation to human trafficking.¹⁸ Some of its positive obligations have even appeared to be of direct relevance for the protection of fundamental rights in areas of EU law, such as the example of the Dublin returns (explained in the introduction of this article) demonstrates.¹⁹

Where the effective protection of fundamental rights within the scope of EU would indeed require the CJEU to define certain positive obligations, the CJEU may want to take into account the development of positive obligations in the case law of the ECtHR. Especially, where such positive obligations are directly relevant to areas of EU law. The CJEU may also wish to have regard to the conceptual framework surrounding the concept of positive obligations and

¹⁵ See e.g. ECtHR 13 July 2004, appl. no. 69498/01, *Pla and Puncernau v. Andorra*, par. 62.

¹⁶ See e.g. the critiques of former judge Fitzmaurice in his dissenting opinion to ECtHR 13 June 1979, appl. no. 6833/74, *Marckx v. Belgium*; and more recently P.H.P.H.M.C. van Kempen, *Repressie door mensenrechten: over positieve verplichtingen tot aanwending van strafrecht ter bescherming van fundamentele rechten* [Repression by human rights: On positive obligations to apply criminal law to ensure fundamental rights] (Nijmegen: Wolf Legal Publishers 2008).

¹⁷ See e.g. Xenos (2012), *supra* n. 2; and L. Lavrysen, 'The scope of rights and the scope of obligations: positive obligations', in: E. Brems & J.H. Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge: Cambridge University Press 2014), p. 162-182. Recently the ECtHR has also provided a list with indicators that should determine the scope of positive obligations under the Convention, see ECtHR 16 July 2014, appl. no. 37359/09, *Hämäläinen v. Finland* (recognition of gender reassignment within the scope of marriage); and ECtHR 29 January 2014, appl. no. 35810/09, *O'Keeffe v. Ireland* (protection of children from sexual abuse in an education context).

¹⁸ See e.g. ECtHR 9 June 2005, appl. no. 55723/00, *Fadayeva v. Russia*; and ECtHR 7 January 2010, appl. no. 25965/04, *Rantsev v. Cyprus and Russia*; and ECtHR 6 November 2011, appl. no. 47335/06, *Redfearn v. the United Kingdom*, par. 42-43. See further C. Dröge, *Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention* (Berlin: Springer 2003), p. 3.

¹⁹ The ECtHR has also developed the obligation for national courts to provide motivations when they decide not to make a reference for a preliminary ruling to the CJEU, see ECtHR 8 April 2014, appl. no. 17120/09, *Dhahbi v. Italy*.

the criticisms that may be expressed towards the development of such obligations.

3 Active Guidance of Fundamental Rights Protection by the CJEU: Developing Positive Obligations?

Within the context of EU law, fundamental rights are often primarily regarded as limits to the exercise of powers by the EU institutions and the Member States based on EU law, rather than as a basis for giving rise to any new obligations.²⁰ In contrast to the approach of the ECtHR, the CJEU's fundamental rights jurisdiction is limited to interpreting provisions or acts of (secondary) EU law in light of fundamental rights and to determine the validity thereof. Therefore, it would seem as if only negative obligations to protect fundamental rights could be set forth in the case law of the CJEU.²¹ Yet, fundamental rights have in several respects also been used by the CJEU as a basis for defining obligations to take further actions beyond what is (specifically) required by provisions of EU law, giving rise to certain active measures that must be fulfilled by the Member States.

Firstly, to ensure the effective application of EU law at the national level, the CJEU has quite actively shaped certain judicial remedies and powers which must be provided for before the national courts. While in principle EU law relies on the national framework of procedural law if no specific requirements are laid down in EU secondary law, it has become clear in certain judicial disputes that the Member States may need to make new arrangements to provide effective protection of EU law. On several occasions, the CJEU has clarified that judicial remedies need to be made available to allow individuals to challenge infringements of certain rights, which they may incur under EU (secondary) law, that could be caused either by public authorities or by private parties.²² The CJEU has also established that individuals must be able to claim damages before their national courts caused by Member States' failure to implement EU law cor-

²⁰ Cf. further S. Besson, 'European Human Rights, Supranational Judicial Review and Democracy: Thinking outside the judicial box' in: P. Populier & C. van de Heijning (eds), *Human rights protection in the European Legal Order: The Interaction between the European and National Courts* (Cambridge: Intersentia 2011), p. 97-145.

²¹ See e.g. CJEU 17 December 1970, Case C-11/70, *Internationale Handelsgesellschaft*, par. 3-4. Cf. further O. De Schutter, 'The Implementation of the EU Charter of Fundamental Rights through the Open Method of Coordination', *Jean Monnet Working paper* 07/04, p. 4; and T. Ahmed & I. de Jesús Butler, 'The European Union and Human Rights Review: An International Law Perspective', *European Journal of International Law* 17 (2006), p. 771-801.

²² See CJEU 15 May 1986, Case C-222/84, *Johnston*, par. 17-19 (right to equal treatment); CJEU 15 October 1987, Case C-222/86, *Heylens* (free movement of workers), par. 14; CJEU 27 March 2014, Case C-314/12, *UPC Telekabel Wien* (freedom of information of internet users), par. 57; and CJEU 17 September 2014, Case C-562/12, *Liivimaa Lihaveis* (refusal to grant EU subsidies).

rectly.²³ Seized with disputes concerning EU law, national courts must furthermore be able to dispose over several (far-reaching) powers. According to the CJEU, national courts must interpret national law in conformity with fundamental rights that are protected under EU law,²⁴ be able to set aside a national legal provision that is regarded to be in conflict therewith²⁵ and be able to order interim measures.²⁶ By indicating quite clearly which remedies and powers must be made available, several scholars have concluded, in respect of these cases, that the CJEU has in fact imposed positive obligations on the Member States.²⁷ These remedies and powers must also be applied to protect the principle of non-discrimination on grounds of age (as given further expression by EU law)²⁸ and the rights of asylum seekers or third-country nationals who seek to challenge decisions concerning a transfer back to another Member State.²⁹ In this context as well, the CJEU has specifically required national courts to use special techniques and special rules, which would allow them to review the legality of removal decisions (when based on reasons of state security), and even to be able to set an administrative decision aside and to substitute that decision by ordering alternative measures.³⁰

Secondly, the case law of the CJEU increasingly reveals obligations for the administrative authorities that must be undertaken on the basis of fundamental rights. The CJEU has clarified in relation to several types of decisions taken by public authorities, in areas such as tax law, customs law, asylum and immigration law, that individuals must be heard before decisions are taken that may adversely affect their interests, and that decisions must be sufficiently reasoned

²³ See CJEU 19 November 1991, Joined Cases C-6/90 and C-9/90, *Francovich and Bonifaci v. Italy*; CJEU 24 January 2012, Case C-282/10, *Dominguez*, par. 43; and 15 January 2014, Case C-176/12, *Association de médiation sociale*, par. 50.

²⁴ See CJEU 26 June 2007, Case C-305/05, *Ordre des barreaux francophone and germanophone and Others*, par. 28; and Case C-275/06, *Promusicae*, par. 68 and 70.

²⁵ See CJEU 19 November 1991, Case C-6/90, *Francovich*, par. 31-37; and CJEU 16 February 2012, Case C-182/10, *Solvay*, par. 49. In horizontal disputes see CJEU 22 November 2005, Case C-144/04, *Mangold*, par. 77; CJEU 19 January 2010, Case C-555/07, *Kücükdeveci*, par. 51; CJEU 25 July 1991, Case C-208/90, *Emmott*, par. 21-23.

²⁶ See CJEU 19 June 1990, Case C-213/89, *Factoratame*, par. 18-22; CJEU 13 March 2007, Case C-432/05, *Unibet*, par. 67; and CJEU 18 December 2014, Case C-562/13, *Abdida*, par. 50.

²⁷ See S. Prechal & R. Widdershoven, 'Redefining the Relationship between "Rewe-effectiveness" and Effective Judicial Protection', *Review of European Administrative Law* 4 (2011/1), p. 31-50, p. 40-43 and 47-49; and P. Van Cleynenbreugel, 'The Confusing Constitutional Status of Positive Procedural Obligations in EU law', *Review of European Administrative Law* 5 (2012/1), p. 81-100.

²⁸ See CJEU 22 November 2005, Case C-144/04, *Mangold*, par. 77; CJEU 19 January 2010, Case C-555/07, *Kücükdeveci*, par. 51.

²⁹ See CJEU 18 December 2014, Case C-562/13, *Abdida*, par. 50.

³⁰ See CJEU 4 June 2013, Case C-300/11, *ZZ*, par. 57-58; and CJEU 5 June 2014, Case C-146/14 *PPU, Mahdi*, par. 62.

so to allow those individuals to challenge the said decisions.³¹ Sometimes the CJEU leaves little discretion to the Member States and may even expressly prescribe the new procedures that need to be undertaken or laid down by law to comply with the announced positive obligations.³² The CJEU has moreover determined, as was indicated in the introduction, that Member States may need to make provisions for the basic needs of a third-country national who suffers from a particularly serious illness while awaiting the appeal of a transfer decision. Arguably, such obligations had not been expressly provided for under the applicable instrument of EU legislation.³³ Thereby, the CJEU has thus gone beyond clarifying obligations of a merely procedural nature.

The CJEU has also developed several procedural obligations to be fulfilled by the EU institutions. In the *Kadi* judgments, the CJEU has taken a bold move by exercising full judicial review of measures, which were essentially taken on the basis of a Security Council Resolution, to freeze the funds of persons and entities who are associated to terrorist organisations and activities.³⁴ The CJEU thereby clarified that EU authorities must ensure that the person and entities subject to the sanctions are informed of the grounds for their placement on that list and that they are allowed to make their views known within a reasonable time after placement on the list.³⁵ In addition, also the General Court has established in the case of *LTTE v. Council*, that the Council must, when basing a decision to freeze the funds of a terrorist organisation on a decision of a third country, first examine whether the rights of the defence and the right to effective judicial protection are equivalent to the level of fundamental rights guaranteed by the EU.³⁶ Essentially these obligations that require (particular) procedures to be followed are all judge-made.

Thirdly, although very exceptionally, the CJEU has imposed an obligation directly to undertake legislative action. In the case of *Chatzi*, the CJEU estab-

³¹ On the right to be heard, see CJEU 22 November 2012, Case C-277/11, *M.*, par. 81; CJEU 18 December 2008, Case C-349/07, *Sopropé*, par. 36-37; and CJEU 3 July 2014, Case C-129/13, *Kamino International Logistics*, par. 31-34. On the obligation for courts to motivate their decisions, see CJEU 15 October 1987, Case C-222/86, *Heylens*, par. 15; CJEU Case C-300/11, *ZZ*, par. 65; CJEU 17 July 2014, Case C-372/12, *Y. and S.*, par. 66-67; and CJEU 22 November 2012, Case C-277/11, *M.*, par. 88.

³² CJEU 5 November 2014, Case C-166/13, *Mukarubega*, par. 62; and CJEU 11 December 2014, Case C-249/13, *Boudjlida*, par. 55-56.

³³ See CJEU 18 December 2014, Case C-562/13, *Abdida*, par. 59-62. See further section 4.2 of this article.

³⁴ CJEU 3 September 2008, Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation/ Council and Commission*; and CJEU 18 July 2013, Case C-584/13 P, *Commission and Others v. Kadi*.

³⁵ See CJEU 3 September 2008, Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation/ Council and Commission*, par. 336-337 and 348; See further A. Cuyvers, "Give me one good reason": the unified standard of review for sanctions after *Kadi II*, *Common Market Law Review* 51 (2014), p. 1759-1788.

³⁶ See General Court 16 October 2014, T-208/11, *LTTE v. Council*, par. 138-139 and 210-212.

lished that the national legislature must take measures to ensure that it establishes a parental leave regime, which ensures that the parents of twins receive treatment that takes due account of their particular needs.³⁷ This obligation had not been specifically provided for under the applicable EU Parental Leave Directive, which only required Member States to meet certain minimum standards.³⁸

In combination, the case law of the CJEU thus includes already a (small) variety of judicial, administrative and legislative obligations requiring Member States, as well as the EU institutions to undertake particular action on the basis of fundamental rights. Action that does not follow from very specific or explicit provisions of EU law itself.

4 Limits to Positive Obligations Flowing from EU Law

In what respect should the establishment of the obligations, discussed in the previous section, actually be considered problematic? Admittedly, it concerns obligations which are much less far-reaching as compared to some of the positive obligations which have been established by the ECtHR.³⁹ Moreover, there is often, at least partly, a basis for imposing such obligations to be found in secondary EU law in combination with provisions of fundamental rights. Some of the measures which have been specified by the CJEU (e.g. the provision of a remedy, and the obligation to provide for hearings) can also logically be derived from the specific fundamental right(s) itself. Since the entry into force of the CFR, such requirements have even been clearly laid down in primary EU law (see in particular Arts. 41 and 47 CFR).

The development of positive obligations could nevertheless be problematic within the context of EU law if it conflicts with Article 51(2) CFR. This provision holds that:

‘The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.’

The limits related to the principle of attributed powers are clearly stressed in the specific context of the CFR, even though such limits are already generally

³⁷ See CJEU 16 September 2010, Case C-149/10, *Chatzi*, par. 68 and 75.

³⁸ Clause 2(i) of the annex to Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ 1996 L 145/24.

³⁹ Cf. e.g. the case of *Öneryildiz* in which the ECtHR clarified that the state has a positive obligation to regulate dangerous activities on the basis of the protection of the right to life, see ECtHR 30 November 2004, appl. no. 48939/99, *Öneryildiz*.

seen in Article 5 TEU.⁴⁰ Since there is a particular fear that the powers of the EU will expand due to the protection of fundamental rights, it must be ensured that the principle of attributed powers is indeed respected.⁴¹ This could raise particular difficulties for accepting positive obligations, especially if they give rise to new powers to act.⁴² Article 51(2) would especially seem to preclude the creation of any new legislative obligations.⁴³ The Member States have not attributed a general power to the EU to take actions to protect fundamental rights.⁴⁴ It has been argued, however, that fundamental rights protection can still be provided on the basis of an 'indirect' or 'accessory' power.⁴⁵ After all, the EU must ensure that fundamental rights are respected within the exercise of all of its powers. This would imply that there is an indirect power for the EU to be able to comply with any negative, as well as positive, obligations which fundamental rights may give rise to. Such an indirect power must, however, closely follow the limits and the scope of another power that has explicitly been attributed to the EU (such as in the area of asylum law). It must also be ensured that such an indirect power indeed remains 'accessory' to the explicit power to which it is related.⁴⁶ The CJEU must be mindful of these limits when interpreting and applying fundamental rights.

In relation to this, the CJEU must also respect the limited scope of application of the fundamental rights laid down in the CFR when developing any active requirements. EU fundamental rights standards and requirements may only be imposed on the EU institutions and on the Member States when they implement EU law within the meaning of Article 51(1) CFR. Again, it is stated in this

⁴⁰ The expansion of the powers of the EU constitutes a concern that is more broadly discussed, see e.g. P. Craig, 'Competence: clarity, conferral, containment and consideration', *European Law Review* 29 (2004), p. 323-344.

⁴¹ In addition see Art. 1(3) of the Draft Agreement and the explanatory report, 47+1(2013)008rev2, at www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1%282013%29008rev2_EN.pdf (last consulted on 29 June 2015); and Art. 2 of Protocol, no. 8 TEU.

⁴² For a discussion on the implications following from Art. 51 CFR for a development of positive obligations, see in particular A. Heringa & L. Verhey, 'The EU Charter: Text and Structure', *Maastricht Journal* 8 (2001), p. 19-20; and J. van der Velde, 'The Protection of Fundamental Rights within the European Union – a historical approach' in: J. Wouter, L. Verhey & P. Kiiver (eds), *European Constitutionalism beyond Lisbon* (Antwerp: Intersentia 2009), p. 74-78.

⁴³ Yet, as will be discussed later on, a 'competence creep' could occur in a quite subtle way, i.e. by the extension of the scope of EU law, see S. Prechal, 'Competence Creep and General Principles of Law', *Review of European Administrative Law* 3 (2010), p. 5-22.

⁴⁴ Yet, the existence of powers in some specific fields may be accepted, see Art. 16(2) (protection of personal data); Art. 19 (non-discrimination on different grounds); and Art. 157(3) TFEU (principle of equal treatment of women and men).

⁴⁵ See P. Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question', *Common Market Law Review* 39 (2002), p. 983; Besson (2011), *supra* n. 20, p. 44-45; and E. Muir, 'The Fundamental Rights Implications of EU Legislation: Some Constitutional Challenges', *Common Market Law Review* 51 (2014), p. 226.

⁴⁶ See Eeckhout (2002), *supra* n. 45, p. 983.

provision that the EU institutions and the Member States must ‘respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties’.⁴⁷ The CJEU has arguably given quite a broad interpretation of when Member States’ action amounts to the ‘implementation of EU law’. It has held in the *Åkerberg Fransson* case that the CFR applies ‘where national legislation falls within the scope of Union law’.⁴⁸ Thus the protection of fundamental rights based on the CFR may not go beyond the (legislative) action which has already been taken at the national level to give effect to the obligations that derive from EU (secondary) law. Therefore, the limited scope of application of EU fundamental rights also aims to limit the creation of any new (legislative) fundamental rights obligations.

Further it must be noted that the CFR specifically precludes positive action to be taken on the basis of the rights in the CFR that would classify as ‘principles’. A particular distinction has been made in Article 52(5) between ‘rights’ and ‘principles’. The distinction affects the justiciability of the particular provisions containing principles before the EU courts. In the explanations relating to the CFR it is stated in respect of Article 52(5) that these principles ‘do not give rise to direct claims for positive action by the Union institutions or Member States authorities.’ It is therefore of particular importance to be careful with respect to the interpretation and application of principles. Unfortunately, it is still far from clear which provisions of the CFR actually contain such principles’.⁴⁹ Since it does not seem to relate to the rights which will be discussed further on in this article, the implications of this provision will not be examined any further in this article.

The following subsections will therefore specifically discuss to what extent the development by the CJEU of the obligations giving rise to judicial, administrative and legislative powers respectively, can be regarded as problematic on the basis of the limits laid down in Article 51 CFR.

47 See further D. Sarmiento, ‘Who’s afraid of the Charter? The Court of Justice, National Courts, and the New Framework of Fundamental Rights Protection’, *Common Market Law Review* 50 (2013), p. 1267-1304; X. Groussot, L. Pech & G.T. Petursson, ‘The Reach of EU Fundamental Rights on EU Member States Action after Lisbon’, in: S. de Vries, U. Bernitz & S. Weatherill (eds), *The Protection of Fundamental Rights After Lisbon* (Oxford: Hart Publishing 2013), p. 97-118.

48 See CJEU 26 February 2014, Case C-617/10, *Åkerberg Fransson*, par. 21; and more recently CJEU 6 March 2014, Case C-206/13, *Siragusa*, par. 24-25 and 31-32.

49 Recently in the case of *Glatzel*, for the first time the CJEU clarified that Art. 26 on the integration of persons with disabilities, concerns a principle instead of a right, see CJEU 22 May 2014, Case C-356/12, *Glatzel*, par. 77-78. See further on the limitations of the CFR, K. Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’, *European Constitutional Law Review* 8 (2012), p. 375-403.

4.1 Judicial Remedies and Powers

In order to fulfil the requirements which have been defined by the CJEU in its case law, on the basis of the principle of effective judicial protection, Member States have had to make changes to national procedural law. This causes a certain tension in view of the autonomous power of the Member States in this area.⁵⁰ Where secondary EU law does not provide for any specific arrangements concerning the judicial protection and enforcement of EU law at national level, discretion is in principle left to the Member States to apply their own procedural rules.⁵¹ Scholars have therefore often raised concerns over the, at times, intrusive interference by the CJEU in respect to the development of judicial remedies and powers which Member States must dispose of to protect EU law.⁵²

To a certain extent, this could be compared to the development of procedural positive obligations in the case law of the ECtHR.⁵³ The ECtHR has extended states' obligations to guarantee judicial remedies beyond the areas defined by Article 6 ECHR (civil and criminal law) and into the realm of certain administrative areas.⁵⁴ By doing so, the ECtHR interfered with Member States powers and caused some legal uncertainty over the obligations which states could incur under the ECHR. At the same time, under EU law, there is a much clearer basis for requiring Member States to introduce judicial remedies to protect EU law.⁵⁵ Article 47 CFR clearly requires the provision of a judicial remedy in respect to violations of the rights and freedoms which are guaranteed under EU law, as

⁵⁰ However it may be discussed whether Member States' procedural powers can indeed still be regarded as 'autonomous', cf. W. van Gerven, 'Of rights, remedies and procedures', *Common Market Law Review* 37 (2000), p. 501-502; and M. Bobek, 'Why there is no principle of "procedural autonomy" of the Member States' in: B. De Witte & H. Mecklitz (eds), *The European Court of Justice and the Autonomy of the Member States* (Antwerp: Intersentia 2011), p. 305-322.

⁵¹ See CJEU 16 December 1976, Case C-33/76, *Rewe*, par. 5. Cf. the critical evaluation of the development of procedural standards by AG Warner in his Opinion to Case C-265/78, *Ferwerda*, delivered on 27 September 1979. Cf. Prechal & Widdershoven (2011), p. 40-41; and Cleynenbreugel (2012), *supra* n. 27 p. 88-89.

⁵² See e.g. Prechal & Widdershoven (2011), *supra* n. 27.

⁵³ See further E. Brems, 'Procedural Protection. An examination of procedural safeguards read into substantive Convention rights' in Brems and Gerards, *supra* n. 17.

⁵⁴ See e.g. ECtHR 23 October 1985, appl. no. 8848/80, *Bentham*; and ECtHR 6 November 2011, appl. no. 47335/06, *Redfearn v. the United Kingdom*, par. 42-43 (on the protection of individuals against dismissals which are solely motivated by an individual's affiliation against a political party).

⁵⁵ Cf. Cleynenbreugel (2012), *supra* n. 27, p. 94-95. While concerns continuously arise in respect of the limited standing rights for challenging act of the EU institutions directly before the CJEU on the basis of Art. 263 TFEU, there seems limited scope for the CJEU to provide a further going protection on the basis of fundamental rights as the explanatory memorandum to the CFR specifically states in respect of Art. 47 that it is not intended to change the system of judicial review as laid down by EU law, and especially not the system of judicial review as against the acts of the Union institutions.

well as other guarantees including the right to legal aid.⁵⁶ Moreover, Article 19(1) TEU which requires Member States to provide for sufficient remedies in the fields covered by EU law provides an additional, and arguably quite strong, basis for imposing certain procedural obligations on the Member States.⁵⁷ Before the Treaty of Lisbon, the CJEU needed to resort to the general principle of effective judicial protection which was judge-made, and the requirement of the principle of loyal cooperation that very generally requires Member States to take measures to fulfil the obligations arising from EU law (Art. 4(3) TEU); these constitute arguably much weaker bases than is now seen in EU primary law.⁵⁸ If the CJEU would require Member States to fulfil certain procedural obligations, this does not seem to be in direct conflict with Article 51 CFR taking into account the stronger bases now laid down in EU primary law.

Still, the CJEU must be careful when indicating what particular remedies need to be made available and which powers national courts must dispose of. Member States still retain their discretionary powers in the area of procedural law.⁵⁹ In a different scenario, which seems more respectful of national procedural autonomy, the CJEU could, rather than imposing obligations on the Member States, merely declare that the arrangements which were made at the national level are incompatible with EU law. Thereby leaving it to the discretion of the Member States to provide for particular arrangements which are compatible. Yet, that could seem unsatisfactorily when national courts may want more clear answers from the CJEU, or if a more uniform interpretation of EU law is required.

In some respects, it has moreover appeared that legislative changes need to be made in order to comply with the procedural obligations laid down in the case law of the CJEU. This would then raise a rather direct conflict with Article 51(2) CFR. In the particular circumstances of the *Factortame* and *Unibet* cases, it appeared that legislative modifications needed to be made to directly ensure that interim measures could be provided for under a generally very complex set of rules at the national level, which governed the procedural rules of the Member States.⁶⁰

⁵⁶ Art. 47 CFR was even relied upon before the CFR itself became binding, see CJEU 13 March 2007, Case C-432/05, *Unibet*, par. 37.

⁵⁷ See CJEU 17 September 2014, Case C-562/12, *Liivimaa Lihaveis*, par. 68.

⁵⁸ See further J.T. Lang, 'The development by the court of justice of the duties of cooperation of national authorities and community institutions under Article 10 EC', *Fordham International Law Journal* 31 (2008), p. 1483-1532. Moreover, the principle of supremacy of EU law which requires that national law incompatible with EU law must be set aside has been used as a basis for the imposition of procedural obligations, see CJEU 19 June 1990, Case C-213/89, *Factortame*, par. 19-21. Cf. CJEU 9 March 1987, Case C-106/77, *Simmenthal*, par. 21.

⁵⁹ Cf. Bobek (2011), *supra* n. 50.

⁶⁰ This has been illustrated by Cleynenbreugel (2012), *supra* n. 27, also in respect of CJEU 18 October 2011, Joined Cases 128/09 to C-135/09, *Boxus and others*.

Also, while Member States may expect to incur obligations in relation to the principle of effective judicial protection, the particular approach of the CJEU in the field of national procedural rules has been criticised for its lack of predictability.⁶¹ The CJEU sometimes uses the more relaxed standards of equivalence and effectiveness, but equally sometimes resorts to the more stringent standard of the principle of effective judicial protection, or even sometimes combines the standards.⁶² Moreover, the underlying relationships and rationales are not always very clear. The principles of effectiveness and equivalence in the CJEU case law seem to express that the Member States are allowed a certain discretion to comply with their obligations under EU law. On several occasions the CJEU has also clearly stressed that generally the creation of new remedies to comply with the principle of effective judicial protection is not necessary.⁶³ Yet the CJEU has at times indeed required new remedies to be created.⁶⁴ Increasingly, perhaps for that reason, national courts have raised questions concerning the requirements of EU law as regards the protection of the principle of effective judicial protection. Therefore, there is a certain amount of uncertainty over what obligations the Member States can expect to incur under EU law.

4.2 Administrative Obligations

In contrast to judicial remedies, the legal basis for imposing procedural obligations on the administrative authorities has been considerably less clear. The CFR actually seems to have created more uncertainty. Initially, the right to be heard and the obligation to motivate decisions were established by the CJEU on the basis of the rights of defence which was (and still is) guaranteed as a general principle of EU law. Now, however, the CFR guarantees such obligations as part of the right to good administration in Article 41. Yet, this provision is only addressed to the institutions, bodies, offices and agencies of the EU.⁶⁵ In recent years many questions have been raised by national courts as to whether national administrative authorities incur obligations to hear and provide motivations in different areas where EU law may be applicable.⁶⁶ In a

⁶¹ See in particular Prechal and Widdershoven (2012), *supra* n. 27.

⁶² See in particular Prechal and Widdershoven (2011), *supra* n. 27.

⁶³ See CJEU 13 March 2007, Case C-432/05, *Unibet*, par. 40.

⁶⁴ See European Commission report 14 April 2014, *Fundamental Rights: Importance of the EU Charter grows as citizens stand to benefit*, IP/14/422, p. 6.

⁶⁵ It is moreover questioned whether this provision included indeed subjective rights or whether it also includes principles within the meaning of Art. 52(5) CFR, see H.C.C. Hofman & B.C. Mihaescu, 'The relationship between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case', *European Constitutional Law Review* 9 (2013), p. 88 and further.

⁶⁶ European Commission report 14 April 2014, *Fundamental Rights: Importance of the EU Charter grows as citizens stand to benefit*, IP/14/422, p. 6.

line of cases, the CJEU has explained that the principles of good administration were indeed to be respected by the Member States. Though initially it did not explain whether such actions would need to be taken on the basis of Article 41.⁶⁷ The CJEU has only more recently established that Article 41 of the CFR indeed only applies to the institutions, bodies, offices and agencies of the EU, while the principles of good administration must still be respected by the Member States but only on the basis of the general principles of EU law.⁶⁸ The CJEU has thus now brought more clarity in this regard.⁶⁹

In this context, the same principle of national procedural autonomy must be respected by the CJEU.⁷⁰ The CJEU may therefore not impose very specific requirements on the national authorities. In most cases, the CJEU appears to remain deferential to national authorities by primarily relying on the principles of equivalence and effectiveness. Interestingly, in the cases of *Mukarubega* and *Boudjlida*, the CJEU went a bit further.⁷¹ These cases concerned illegally-staying third-country nationals, which had been heard by the domestic authorities in respect to the decision on the lawfulness of their stay, but not on their return decisions. The CJEU was asked to clarify how the rights of defence would have to be fulfilled. The CJEU clarified that where the return decision had not been directly related to the decision to refuse a residence permit (*Mukarubega*) or the third-country national could not reasonably suspect what evidence might be relied upon against him (*Boudjlida*), Member States may need to hear those individuals again.⁷² Although in both cases the CJEU concluded that an additional hearing was not necessary, the detailed requirements that it provided may still interfere to some extent with the powers of the Member States at the national level. Also, it could be considered problematic that in *Mukarubega*, the CJEU expressly required Member States to lay down in national law the obligation to leave the national territory in the case of an illegal stay, while this legislative obligation was not provided for under the applicable Directive itself.⁷³

⁶⁷ Cf. CJEU 22 November 2012, Case C-277/11, *M.*, par. 81 and ff; CJEU 10 September 2013, Case C-383/13, *M.G. and N.R.*, par. 32; CJEU 8 May 2014, Case C-604/12, *H.N.*, par. 49; and CJEU 3 July 2014, Case C-129/13, *Kamino International Logistics*, par. 28.

⁶⁸ See CJEU 17 July 2014, Case C-141/12, *YS and Others*, par. 67; and CJEU 5 November 2014, Case C-166/13, *Mukarubega*, par. 45; and CJEU 11 December 2014, Case C-249/13, *Boudjlida*, par. 34.

⁶⁹ This has also clarified that fundamental rights may still need to be protected as general principles of EU law, as is also in accordance with Art. 6(3) TEU.

⁷⁰ Cf. CJEU 10 September 2013, Case C-383/13, *M.G. and N.R.*, par. 35; CJEU 8 May 2014, Case C-604/12, *H.N.*, par. 41; and CJEU 5 November 2014, Case C-166/13, *Mukarubega*, par. 51; and CJEU 11 December 2014, Case C-249/13, *Boudjlida*, par. 41.

⁷¹ CJEU 5 November 2014, Case C-166/13, *Mukarubega*; and CJEU 11 December 2014, Case C-249/13, *Boudjlida*.

⁷² CJEU 5 November 2014, Case C-166/13, *Mukarubega*, par. 62; and CJEU 11 December 2014, Case C-249/13, *Boudjlida*, par. 56.

⁷³ CJEU 5 November 2014, Case C-166/13, *Mukarubega*, par. 62.

The requirements that need to be fulfilled by administrative authorities, *i.e.* to hear individuals before taking decisions that would adversely affect their interests and to motivate those decisions, could create additional burdens at the national level. Therefore, these obligations may be received critically. Concerns would especially arise when obligations are financially burdensome. Such obligations were formulated, by the CJEU, in the case of *Abdida*. In that particular case, the CJEU clarified that Member States would have to provide for the basic needs of a third-country national, during the appeal of a return decision, who is seriously ill and lacks the means to provide for themselves.⁷⁴ In comparison, the applicable Returns Directive itself had only required Member States to ensure, as far as possible, that emergency health care and essential treatment of illnesses were provided for. According to the CJEU, however, the respective provision of the Directive would be rendered meaningless if basic needs were not provided for as well. The CJEU expressly rendered its judgment in light of the *non-refoulement* principle and relevant case law of the ECtHR.⁷⁵ The creation of such financial obligations may warrant a very careful approach, as the establishment of such obligations, on the basis of fundamental rights in the case law of the ECtHR, has, for obvious reasons, appeared very problematic.⁷⁶ Mindful thereof, the CJEU has decided to apply a far more restrictive approach, in other cases, concerning financial obligations that may be required to ensure the protection of certain fundamental rights.⁷⁷

4.3 Legislative Obligations

In general, the creation of any legislative obligations to ensure the protection of fundamental rights may not be expected, due to the clear limitations that relate to the principle of attributed powers and to Article 51 CFR.⁷⁸ The formulation by the CJEU of legislative obligations in the case of *Chatzi* has therefore met with criticism.⁷⁹ In that case, the CJEU required that

⁷⁴ CJEU 18 December 2014, Case C-562/13, *Abdida*, par. 59-62.

⁷⁵ See CJEU 18 December 2014, Case C-562/13, *Abdida*, par. 52; and cf. ECtHR 26 April 2007, appl. no. 25389/05, *Gebremedhin v. France*, par. 67; and ECtHR 23 February 2012, appl. no. 27765/09, *Hirsi Jamaa and Others v. Italy*, par. 200. See further section 5 of this article.

⁷⁶ See e.g. ECtHR 9 October 1979, appl. no. 6289/73, *Airey v. Ireland* (on the right to provide for free legal aid).

⁷⁷ See CJEU 18 December 2014, Case C-542/13, *M'Bodj*, par. 41. For a brief discussion, see section 5 of this article.

⁷⁸ Yet the requirement to set aside national laws in cases such as *Mangold* and *Kücükdeveci* may be regarded as problematic as well on the basis of the principle of attributed powers. See CJEU 22 November 2005, Case C-144/04, *Mangold*, par. 77; CJEU 19 January 2010, Case C-555/07, *Kücükdeveci*, par. 51; and cf. Prechal (2000), *supra* n. 27, p. 16-19.

⁷⁹ See E. Muir, 'The ECJ: a fundamental rights institution among others' in: M. Dawson, B. de Witte & E. Muir (eds), *Judicial Activism at the European Court of Justice* (Cheltenham: Edward Elgar 2013), p. 89-90.

a national parental leave regime takes into account the specific needs of parents of twins.⁸⁰ The CJEU established this requirement on the basis of the principle of equal treatment, which is protected as a general principle of EU law and by Article 20 CFR. Meanwhile, EU law itself, under the Parental Leave Directive, had only actually provided for a minimum requirement of parental leave of three months.⁸¹ Here, it is uncertain whether any further actions that may need to be taken still fall within the scope of EU law. The wide scope of application of fundamental rights in respect of national measures has more generally appeared to be somewhat of a challenge. It has become clear that Member States must respect EU fundamental rights when they have broad discretion in the implementation of EU law, and in respect of national legislation which was not as such adopted with a view to the implementation of EU law.⁸² Also, there remains a certain amount of uncertainty over the scope of application of the CFR and the general principles of EU law. The CJEU generally only explains on a case-by-case basis whether the particular situation falls within the scope of EU law. Only more recently, has the CJEU provided some further criteria to determine when fundamental rights apply to national measures.⁸³ In several cases, the CJEU has indeed made it very clear that the protection of fundamental rights by the EU is not intended to extend the competences of the EU, as defined by the Treaties, and has declared various issues to fall outside the scope of application of the CFR.⁸⁴

It appears especially problematic in the case of *Chatzi* for the CJEU to discuss in quite some detail which measures Member States could take to actually ensure the protection of the equal treatment principle in relation to parental leave for twins. The CJEU admitted that the national legislature retained a 'wide freedom of action'.⁸⁵ Yet, it also further clarified that member states could choose to extend the period for parental leave, to organise flexible ways of work, and provide material assistance, such as a right of access to childcare centres or financial aid.⁸⁶ The measures which Member States would take beyond the Parental Leave Directive have been considered to constitute more extensive protection which falls within the competences of the Member States. In this specific regard,

⁸⁰ See CJEU 16 September 2010, Case C-149/10, *Chatzi*, par. 75.

⁸¹ Clause 2(1) of the annex to Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, *OJ* 1996 L 145/24.

⁸² Cf. CJEU 21 December 2011, Joined Cases C-411/10 and C-493/10, *N.S. and Others*; and CJEU 22 November 2005, Case C-144/04, *Mangold*. See further Sarmiento (2013), and Groussot, Pech & Petursson (2013), *supra* n. 47.

⁸³ Cf. CJEU 6 March 2014, Case C-206/13, *Siragusa*, par. 24-25 and 31-32.

⁸⁴ See e.g. CJEU 11 November 2014, Case C-333/13, *Dano*, par. 88.

⁸⁵ See CJEU 16 September 2010, C-149/10, *Chatzi*, par. 71.

⁸⁶ See CJEU 16 September 2010, C-149/10, *Chatzi*, par. 72-73.

the approach of the CJEU in *Chatzi* is considered in conflict with the principle of attributed powers.⁸⁷

In comparison, the case law of the ECtHR contains many more examples of positive obligations to adopt legislation to ensure fundamental rights protection. Although the ECtHR also aims to be very careful as to not interfere in states' legislative powers.⁸⁸ However, The division of legislative powers between the EU and the Member States is generally of much greater concern.

4.4 Summing up the Main Challenges for the Effective Protection of Fundamental Rights by the CJEU

The foregoing sections have discussed that there is indeed a certain basis in EU law that allows the CJEU to impose certain procedural as well as material obligations on the Member States to ensure the effective protection of rights. This includes the right to effective judicial review, to good administration, and the principle of *non-refoulement* and the prohibition of torture, inhuman or degrading treatment. In the development of such obligations, by the CJEU, there does not appear to be a direct conflict with Article 51 CFR, unless it appears that Member States incur new legislative obligations or legislative obligations which fall outside the scope of EU law. For the most part, the procedural as well as material fundamental rights obligations can be founded, in some part, on the basis of secondary EU law in combination with provisions of the CFR.

The development of positive obligations, by the CJEU, appears to particularly raise concern if the CJEU interferes too much with the choices that can be made at national level in order to comply with EU law. It has been regarded as particularly problematic where the CJEU has specified, in quite some detail, how the right to an effective judicial remedy and the right to good administration would have to be protected at national level for the Member States still enjoy discretion on the basis of the principle of national procedural autonomy. If such obligations impose organisational or financial burdens on the Member States, this may raise concern considering that the development of positive obligations in the case law of the ECtHR has been criticised particularly on that account.

The other main concern seems to be that there is a certain amount of legal uncertainty over the obligations which Member States could incur on the basis of fundamental rights. This could partly be explained by the fact that there may

⁸⁷ See M. de Mol, 'Het toepassingsgebied van Unierechtelijke grondrechten & het beginsel van de allocatie van bevoegdheden [The scope of application of EU fundamental rights and the principle of allocation of competences]', *Maastricht Faculty of Law Working Paper* 2012/6, p. 27-28.

⁸⁸ See e.g. ECtHR 13 June 1979, appl. no. 6833/74, *Marckx v. Belgium*; and ECtHR 11 July 2002, appl. no. 28957/95, *Case of Christina Goodwin v. the United Kingdom*.

be certain gaps in EU legislation or that it contains vaguely formulated provisions. However, the requirements of fundamental rights protection may also only be revealed in very concrete circumstances. The CJEU may be expected to deal with such questions and to make some difficult choices, especially if the national courts would ask for even further guidance. At the same time, the CJEU itself also contributes to some extent to the legal uncertainty by mixing up the deferential and the more intrusive approaches in its case law, concerning the requirements of (procedural) fundamental rights protection.

5 Principles for Determining and Limiting the Scope of Positive Obligations

How could the CJEU deal with the foregoing criticism that could, and has been raised, with regard to the development of positive obligations on the basis of fundamental rights? The case law of the ECtHR, which may arguably include some much further reaching positive obligations for states than the CJEU could (ever) develop, may provide inspiration for the CJEU. In this section, several relevant principles which have been formulated in the case law of the ECtHR will be discussed and subsequently applied to some of the cases which have been brought before the CJEU.

Firstly, in dealing with concerns over the division of competences between the EU and the Member States, the CJEU may want to take into account that the ECtHR generally grants Member States a wide margin of appreciation in fulfilling positive obligations; this is often made known in the judgments of the ECtHR.⁸⁹ Fundamental rights provisions are naturally phrased very broadly and therefore generally leave choices to be made with regard to the measures that can be taken. As a supranational authority, the ECtHR, as well as the CJEU, may not be in the best position to decide on a particular form of protection at the national level. Therefore, the CJEU may want to adopt an approach where it expressly makes clear that it indeed grants Member States discretion in finding appropriate measures at the national level to comply with the fundamental rights obligations that need to be fulfilled on the basis of EU law. At the same time, the CJEU may be required to provide quite clear indications as to the obligations which Member States need to fulfil, since national courts sometimes refer very specific questions to the CJEU, or rather because the CJEU may itself want to secure a uniform interpretation of EU law in certain fields (for example if they are exhaustively regulated by EU law). If so, the CJEU could decide to prescribe clearer indications as to the particular measures it

⁸⁹ See e.g. ECtHR 19 February 1998, appl. no. 22729/93, *Kaya v. Turkey*, par. 106.

requires Member States to take, and it could carefully explain such an approach.

Secondly, in dealing with concerns over the burdens that may be imposed on Member States in securing fundamental rights protection, the CJEU may especially want to take into consideration the limitations which generally apply to the scope of positive obligations. The ECtHR generally does not require states to incur ‘impossible or disproportionate burdens’ in the protection of fundamental rights.⁹⁰ Positive obligations are in principle obligations of conduct rather than of result. The ECtHR understands that the effective protection of fundamental rights may give rise to measures which have financial implications, especially where social and economic measures need to be taken. There is obviously a limit to what states can achieve. The ECtHR has acknowledged this by requiring states (only) to take ‘reasonable measures’.⁹¹ States parties must actually dispose of the organisational and financial means to provide for effective protection.⁹² Furthermore, the ECtHR only accepts positive obligations when public authorities (ought to) have knowledge of the infringement of the fundamental rights of certain (groups of) individuals and their causes.⁹³

By clarifying the methodological choices in developing its positive obligations and by granting states discretion in fulfilling their obligations, as well as by imposing limitations to the scope of positive obligations the ECtHR creates a certain amount of legal certainty and foreseeability that may help these obligations to be accepted.⁹⁴ This may be a reason for the CJEU to provide greater clarity as to the choices that it makes in fundamental rights cases. Therefore, it would perhaps help the CJEU to depart from its judicial style which has been characterised by De Búrca as ‘self-referential, formulaic and often minimalist’.⁹⁵

⁹⁰ The ECtHR has even expressed that the scope of states’ positive obligations is inherently limited under the Convention, see e.g. ECtHR, admissibility decision of 14 May 2002, no. 38621/97, *Case of Zehnalova and Zehnal v. the Czech Republic*.

⁹¹ See e.g. ECtHR 20 March 2008, appl. nos. 15339/02 to 15343/02, *Budayeva and Others v. Russia*, par. 175; and ECtHR 9 December 1994, appl. no. 16798/80, *López Ostra v. Spain*, par. 51.

⁹² See *Xenos* (2012), *supra* n. 2, p. 100-107.

⁹³ According to *Xenos*, states have knowledge of fundamental rights infringements *inter alia* in contexts where it is evident that fundamental rights infringements take place (e.g. in hazardous industries or health care), where (scientific) reports have been presented regarding fundamental rights infringements, and where complaints have been brought to the attention of the state, see *Xenos* (2012), *supra* n. 2, p. 82-91.

⁹⁴ In finding out whether active measures to protect fundamental rights can be accepted, the ECtHR generally adopts a fair balance test which implies that the interests of the individual to the protection of a particular fundamental right are weighed against the general interests and the interests of the Community, see e.g. ECtHR 17 October 1986, appl. no. 9532/81, *Rees v. the United Kingdom*, par. 37.

⁹⁵ G. de Búrca, ‘After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?’, *Maastricht Journal of European and Comparative Law* 20 (2013), p. 168-184.

In some areas where it may appear difficult to ensure an effective protection of fundamental rights, the CJEU may thus want to take the foregoing principles into account. The recent remarks of the CJEU in *Opinion 2/13* as to the protection of fundamental rights by the Member States in areas governed by the principle of mutual trust – which were also briefly discussed in the introduction – has raised some concerns.⁹⁶ The CJEU seems to have provided very little room for the Member States to check whether other Member States have observed fundamental rights in the areas of asylum, criminal and civil law in which they must cooperate on the basis of the principle of mutual trust. It is of importance to examine the case law of the ECtHR here in more detail as it has rather carefully formulated when and what type of positive obligations the Member States would need to fulfil to comply with their obligations under the ECHR.⁹⁷

The ECtHR has established that there must be a minimum level of severity for complaints to fall within the scope of Article 3 ECHR.⁹⁸ In *M.S.S.* the ECtHR clearly decided that this threshold had been reached and that states parties were precluded from sending asylum seekers to Greece as substantial grounds had been shown that there was a serious risk of treatment contrary to Article 3 ECHR. However, the ECtHR has not reached the same conclusion in respect of other states parties within the EU.⁹⁹ In *Tarakhel v. Switzerland*, for example, the ECtHR emphasised that ‘the current situation in Italy can in no way be compared to the situation in Greece at the time of the *M.S.S.* judgment’.¹⁰⁰ In addition, the ECtHR, in principle, requires applicants to advance arguments if they consider that there are substantial grounds for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment. Most relevant to the states then is that the ECtHR concluded in *M.S.S.* that a state has to know or at least ought to have known that asylum seekers were at serious risk of violations under Article 3 ECHR on account of the numerous reports available concerning the general situation for asylum seekers in Greece. The ECtHR has clarified in subsequent cases, dealing with the Dublin Regulation, that information provided for and the letters

⁹⁶ See also L. Storgaard, ‘EU Law Autonomy versus European Fundamental Rights Protection – On *Opinion 2/13* on EU Accession to the ECHR’, *Human Rights Law Review* 15 (2015), p. 507–510.

⁹⁷ Cf. Stubberfield (2012), *supra* n. 3, p. 133–140.

⁹⁸ The ECtHR has used this particular limitation also to narrow down the scope of the protection for environmental claims on the basis of Art. 8 ECHR, arguably so as to avoid a flood of claims in the area of environmental protection, see ECtHR, judgment of 9 June 2005, no. 55723/00, *Case of Fadeyeva v. Russia*, par. 70.

⁹⁹ See ECtHR 2 April 2013, no. 27725/10 (admissibility decision), *Mohammed Hussein v. the Netherlands and Italy* (return to Italy); ECtHR 6 June 2013, no. 2283/12, *Mohammed v. Austria*; and ECtHR 3 July 2014, appl. no. 71932/12, *Mohammadi v. Austria* (returns to Hungary).

¹⁰⁰ See ECtHR 4 November 2014, appl. no. 29217/12, *Tarakhel v. Switzerland*, par. 114.

sent by the United Nations High Commissioner for Refugees (UNCHR) to the Member States have been of importance in determining from which point in time Member States were considered to know of the violations and were thus precluded from sending asylum seekers back to Greece.¹⁰¹ Thus it appears that the ECtHR only requires states to take reasonable measures. However, in its judgment of *Tarakhel v. Switzerland*, the ECtHR required a more pro-active approach by the Member States, though on an exceptional basis. The ECtHR was concerned with the transfer of a family including children who must receive particular protection due to 'their specific needs and extreme vulnerability'.¹⁰² It therefore imposed an obligation on the Swiss authorities to obtain insurances from the public authorities that upon arrival in Italy the applicants would receive facilities and conditions which are adapted to the age of children and that the family is kept together.

Knowing this, perhaps there is room to clarify the positive obligations which the Member States need to fulfil. By specifically indicating when obligations arise for the Member States, as well as indicating the limits which are related to the fulfilment of such obligations, the CJEU could create legal certainty, and therefore prevent a conflict between the obligations that derive from EU law and from the ECHR.¹⁰³

The CJEU could also choose to refer to particular judgments of the ECtHR in its case law to legitimise the development of certain positive obligations within EU law. This would also ensure necessary consistency with respect to the meaning and scope of the fundamental rights as they are laid down in the ECHR. Though the CJEU may also provide further protection on the basis of Article 52(3) CFR.¹⁰⁴ There have already been several interesting examples where the CJEU directly referred to specific judgments of the ECtHR to further justify certain positive obligations.¹⁰⁵

In two recent judgments, the CJEU seems to have shown more awareness of the implications flowing from certain positive obligations. In the case of *Abdida*, the CJEU has expressly referred to the ECtHR cases of *Gebremedhin v. France* and *Hirsi Jamaa and Others v. Italy* to justify the imposition of an obligation on national courts to order interim measures. The CJEU also referred

¹⁰¹ See ECtHR 7 March 2000, no. 43844/98, *T.I. v. The United Kingdom*; ECtHR 2 December 2008, no. 32733/08, *K.R.S.*; ECtHR 5 December 2013, no. 60104/08, *Sharifi v. Austria*; and ECtHR 7 May 2014, no. 44689/09, *Safai v. Austria*.

¹⁰² ECtHR 4 November 2014, appl. no. 29217/12, *Tarakhel v. Switzerland*, par. 119.

¹⁰³ Stubberfield (2012), *supra* n. 3, p. 117.

¹⁰⁴ See further De Búrca (2013), *supra* n. 95.

¹⁰⁵ For example, in *Gascogne* the CJEU expressly referred to the case of *Kudla v. Poland* of the ECtHR to introduce a new remedy before the General Court in relation to a violation of the requirement of a judicial remedy within a reasonable time, cf. CJEU 26 November 2013, Case C-58/12 P, *Group Gascogne v. Commission*, par. 83; and cf. ECtHR 26 October 2000, appl. no. 30210/96, *Kudla v. Poland*.

to the case of *N. v. The United Kingdom* which arguably informed its decision to require basic needs to be provided by member states to third-country nationals who are suffering from a serious illness when awaiting the appeal to the decision to return.¹⁰⁶ The CJEU also stressed that ‘it is for the Member States to determine the form in which such provision for basic needs of the third-country national is made.’¹⁰⁷ The CJEU particularly made sure that such interpretation was to be provided in relation to the provisions of the Returns Directive 2008/115, even though the referring court had not specifically asked questions concerning that Directive. In another recent judgment, in the case of *M’Bodj*, the CJEU expressly clarified that the interpretation that the ECtHR had provided concerning Article 3 ECHR in the case of *N. v. The United Kingdom* could not be applied to determine whether a third-country national who suffers from a serious illness would have to receive subsidiary protection under international law on the basis of the Qualifications Directive.¹⁰⁸ The CJEU clearly explains that such protection does not fall under the minimum standards which must be guaranteed by that Directive, and that the Member States may neither provide such protection by providing a higher level of protection.¹⁰⁹ It would, according to the CJEU, not comply with the rationale of international protection. Instead it clarified that Member States could (still) use their discretionary powers to provide protection for humanitarian or compassionate reasons.

These cases demonstrate that the CJEU is sometimes willing to provide much more clarity with regard to the obligations that Member States may incur in relation to the rights laid down in EU legislation. Yet, at the same time the CJEU expresses some clear limits as to the scope of such obligations which could be read into EU law.

6 Conclusion

The CJEU may need to start considering more generally how it deals with the concept of positive obligations. This article has discussed a range of examples, in the case law of the CJEU, which have led to positive obligations that must be fulfilled by the Member States on the basis of fundamental rights. The CJEU has especially defined several procedural-type obligations, but also some material obligations on the basis of the principle of effective ju-

¹⁰⁶ See CJEU 18 December 2014, Case C-562/13, *Abdida*, par. 47 and 52. Cf ECtHR 26 April 2007, appl. no. 25389/05, *Gebremedhin v. France*, par. 67; ECtHR 23 February 2012, appl. no. 27765/09, *Hirsi Jamaa and Others v. Italy*, par. 200; and ECtHR 27 May 2008, no. 26565/05, *N. v. the United Kingdom*, par. 42.

¹⁰⁷ CJEU 18 December 2014, Case C-562/13, *Abdida*, par. 61.

¹⁰⁸ See CJEU 18 December 2014, Case C-542/13, *M’Bodj*.

¹⁰⁹ CJEU 18 December 2014, Case C-542/13, *M’Bodj*, par. 39-42.

dicial protection, the right to good administration and the principle of *non-refoulement*. National courts are increasingly asking more specific questions about the obligations that may be derived from fundamental rights within the scope of EU law. An individual rights-based approach may allow the CJEU to impose positive obligations directly, as such obligations are necessary to ensure the effective protection of fundamental rights. Then, however, it may want to rely on some specific principles which have been developed in the ECtHR case law and justify the particular choices it makes. The development of positive obligations can impose additional burdens on the Member States, sometimes requiring legislative changes to be made, and it may especially create a certain tension in respect to the division of powers between the EU and the Member States. The CJEU must respect the limits of its own fundamental rights review, as well as the limits which relate to the protection of fundamental rights in general. It must be taken into account that states are generally granted a broad discretion when fulfilling positive obligations. There are generally alternative measures available at the national level; therefore, supranational authorities may not be in the best position to make specific choices as to the measures to be taken. Moreover, positive obligations generally concern obligations of conduct and not obligations of result. Therefore, positive obligations may *inter alia* only give rise to 'reasonable measures' and may only arise where there is knowledge of fundamental rights infringements. The CJEU could expressly recognise such limits in areas where the acceptance of such obligations is feared to be problematic, such as in the area of asylum law.